Filed 6/30/09 Petropoulos v. Dept. of Real Estate CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JIM PETROPOULOS, Plaintiff and Appellant, v. DEPARTMENT OF REAL ESTATE, Defendant and Respondent.	A119065 (Contra Costa County Super. Ct. No. N 04-1459)

Jim Petropoulos appeals from the denial of his motion for attorney fees under the federal Civil Rights Act (42 U.S.C. § 1981 et seq.). Petropoulos's fee motion followed his successful appeal to this court seeking to overturn a decision by the Department of Real Estate (DRE) revoking his real estate broker's license. We affirm the trial court's order denying fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petropoulos obtained his real estate broker's license in 1994. In 1999 and 2000, he was involved in two domestic violence incidents. The first occurred in 1999, and involved Petropoulos's former spouse. The second occurred a few months later, in January 2000, and involved Petropoulos's then-girlfriend. On February 2, 2000, Petropoulos pleaded guilty to misdemeanor battery against his girlfriend, and on May 31, 2000, he was placed on probation conditioned on serving 20 days in jail and completing a domestic violence counseling program. On February 28, 2000, he pleaded nolo contendere to misdemeanor battery against his former wife, and was sentenced to three years' probation and required to attend a domestic violence program.

A. *Administrative Proceedings*[1]

In April 2003, DRE filed an accusation against Petropoulos alleging that (1) on or about May 31, 2000, Petropoulos was convicted of battery under Penal Code section 242; and (2) battery is a "crime involving moral turpitude and/or which is substantially related . . . to the qualifications, functions or duties of a real estate licensee." As a matter in aggravation of Petropoulos's battery conviction, the accusation further alleged that on or about February 28, 2000, Petropoulos had been convicted of another violation of Penal Code section 242, which was also, allegedly, "a crime involving moral turpitude and/or which is substantially related . . . to the qualifications, functions or duties of a real estate licensee."[2] Finally, the accusation alleged that Petropoulos's convictions constituted cause under sections 490 and 10177 of the Business and Professions Code for the suspension or revocation of his real estate broker's license.

DRE's accusation was heard initially by an administrative law judge (ALJ). Petropoulos argued that the offense alleged as a cause for disciplinary action was a misdemeanor that did not involve moral turpitude as then required by Business and Professions Code section 10177, subdivision (b), and that the offense was not substantially related to the qualifications, functions, or duties of a real estate licensee under section 490.

DRE's case-in-chief consisted of police reports and court records pertaining to the January 2000 incident, and court documents evidencing the charges and no contest plea arising from the 1999 incident. According to the police report concerning the 2000 incident, Petropoulos and Patricia Cardenas had been dating for over a year. They got into an argument that began after dinner and continued until bedtime. According to

---

[1] The following summary is drawn from this court's published opinion in *Petropoulos v. Dept. of Real Estate* (2006) 142 Cal.App.4th 554 (*Petropoulos I*).

[2] The February 28 conviction was beyond the three-year limitation period for filing an accusation, and thus could not be an independent cause for discipline. (See Bus. & Prof. Code, § 10101 [accusation shall be filed not later than three years from the occurrence of the alleged grounds for disciplinary action].)

Cardenas, Petropoulos struck her several times in her face and head with his closed fist. She was left with a bruised lower right eye, black and blue in color, and a bump on the back of her head. When contacted by police at the scene, Petropoulos denied striking Cardenas with his hands. At the hearing before the ALJ, Petropoulos testified that Cardenas had sustained her head injuries by striking her head against the bed posts while he was restraining her from continuing to hit him.

DRE argued before the ALJ that although battery is not a crime of moral turpitude per se, the facts and circumstances of the January 2000 incident did involve moral turpitude in that Petropoulos attempted to inflict serious injury on a person with whom he had a close, personal relationship. On the issue of whether there was a substantial relationship between the offense and the duties of a real estate licensee, DRE cited subdivision (a)(8) of its regulation 2910, which establishes criteria to be used by the DRE in making such determinations. (See Cal. Code Regs., tit. 10, § 2910 (hereafter Regulation 2910).) That regulation provided in pertinent part that a crime committed by a licensee would be deemed to be substantially related to the qualifications, functions or duties of a licensee for purposes of section 490 if it involved "[the] [d]oing of any unlawful act with the . . . intent or threat of doing substantial injury to the person or property of another." (Reg. 2910, subd. (a)(8).)

In his proposed decision, the ALJ held that DRE failed to show by clear and convincing evidence that Petropoulos's battery on Cardenas involved moral turpitude. The ALJ found that "the evidence shows that [Petropoulos] and Cardenas got into an argument that escalated into some physical acts." The ALJ found the evidence insufficient to establish that Petropoulos "acted with the sort of 'readiness to do evil' or 'baseness, vileness or depravity' that generally characterize crimes of moral turpitude." The ALJ concluded that no cause for disciplinary action existed against Petropoulos under Business and Professions Code section 10177, subdivision (b). Regarding the substantial relationship issue, the ALJ concluded that the evidence failed to show that Petropoulos had an intent to cause substantial injury to Cardenas. He also noted that an

intent to injure is not a necessary element of the crime of battery. The ALJ therefore held that the accusation against Petropoulos should be dismissed.

The acting real estate commissioner (the Commissioner) rejected the ALJ's proposed decision and requested additional written argument from the parties on the merits of the DRE's accusation. In its written submission to the Commissioner, DRE conceded that "under the facts of the convictions in this case there is no moral turpitude." The DRE's submission relied exclusively on Business and Professions Code section 490, contending that disciplinary action was warranted because Petropoulos committed a crime substantially related to the qualifications, functions, or duties of a real estate licensee for purposes of that section.

In his written decision revoking Petropoulos's broker's license, the Commissioner found cause for disciplinary action under Business and Professions Code section 490 only. He held that the evidence in the police report that Petropoulos punched Cardenas hard enough to bruise her face and raise a bump on the back of her head—in combination with Petropoulos's size[3]—established by clear and convincing evidence that there was a threat of substantial physical injury to the victim under Regulation 2910, subdivision (a)(8).

B. *Mandate Petition*

Petropoulos petitioned the trial court for a writ of mandate ordering DRE to set aside its decision revoking his license and to reinstate the ALJ's proposed decision. The petition contained a single cause of action alleging that the DRE's decision was invalid under Code of Civil Procedure section 1094.5 on the following grounds: "a. [*DRE*] *committed a clear abuse of discretion in that the evidence does not support the findings in the Decision After Rejection.* [DRE] claims that Petitioner's conviction for battery is substantially related to the qualifications of a real estate licensee pursuant to Section 2910(a)(8) Title 10, California Code of Regulations in that it involves the doing of an

[3] According to the police report, Petropoulos was 6 feet 1 inch tall and weighed 230 pounds.

unlawful act with the intent or threat of doing substantial injury to the person or property of another. [DRE] . . . cites as evidence Petitioner's testimony at Hearing . . . that he was trying to leave his friend's place, that she was trying to stop him from leaving by physically hitting him and that she hit her head on a bedpost while he was restraining her. [DRE] further cites as evidence, snippets of the police report whereby the victim stated Petitioner punched her with his fist and Petitioner denied punching victim. *Such conflicting testimony does not provide clear and convincing evidence that Petitioner intended or threatened to do substantial injury.* [¶] b. [*DRE*] *further committed an abuse of discretion in that the Legal Conclusions in the Decision After Rejection are not supported by the findings. . . .*" (Italics added.) The petition further alleged that the "independent judgment test" would apply to the petition because a "fundamental vested right" was involved.[4] Petropoulos also prayed for attorney fees pursuant to Government Code section 800.[5]

The trial court denied the petition, stating in relevant part: "The Court . . . finds that the DRE's ruling is supported by the weight of the evidence, and that the DRE met the requisite burden of proving its case by clear and convincing evidence."

Petropoulos hired new counsel and appealed to this court. He made several new arguments on appeal that had not been raised in the trial court, including the following: (1) his misdemeanor conviction for a crime the DRE conceded did not involve moral turpitude could not as a matter of statutory interpretation support disciplinary action

---

[4] See *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32: "If the order or decision of the agency substantially affects a fundamental vested right, the trial court, in determining under [Code of Civil Procedure] section 1094.5 whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence."

[5] Government Code section 800 authorizes an attorney fee award not to exceed $7,500 to the prevailing plaintiff or petitioner in a civil action to review the outcome of an administrative proceeding, if it is shown that the outcome resulted from the arbitrary or capricious conduct of the agency or one of its officers.

under the governing disciplinary statutes; (2) misdemeanor battery committed in his personal life bore no substantial relationship to Petropoulos's fitness to be a real estate licensee—a nexus required by principles of substantive due process in order for the state to interfere with his right to practice his profession; [6] and (3) he was denied a fair hearing when the Commissioner ordered him to file the opening brief, and then rendered his decision based on a new theory asserted by the DRE for the first time in its responding brief without giving the accused an opportunity to reply.

In *Petropoulos I*, this court agreed to consider Petropoulos's statutory argument even though it had not been raised in the trial court because it depended exclusively on uncontroverted facts and raised an issue of first impression that was likely to affect other DRE licensees. We found that the revocation of Petropoulos's license could not stand because it was based on a misdemeanor conviction for a crime the DRE had conceded did not involve moral turpitude. [7] We rejected DRE's argument that Business and Professions Code section 490 provided an independent basis for disciplinary action, and remanded the case to the trial court with directions to enter a peremptory writ in Petropoulos's favor. We did not reach Petropoulos's substantive due process and "fair hearing" arguments.

C. *Fee Proceedings on Remand*

On remand from this court, Petropoulos moved for an award of attorney fees in an amount exceeding $125,000. His principal argument was that he was entitled to fees under the federal Civil Rights Act (42 U.S.C. §§ 1983, 1988 (hereafter section 1983 & section 1988)) because he "prevailed in this action involving significant due process violations." He argued in the alternative that he was entitled to fees under Government

[6] See, e.g., *Schware v. Board of Bar Examiners* (1957) 353 U.S. 232, 238–239; *Endler v. Schutzbank* (1968) 68 Cal.2d 162, 169–170.

[7] The Legislature subsequently amended Business and Professions Code section 10177, subdivision (b), to eliminate the moral turpitude requirement with respect to misdemeanor convictions. (Stats. 2007, ch. 140, § 1, p. 732.)

Code section 800, because the revocation of his license was arbitrarily or capriciously imposed. The trial court denied Petropoulos's motion, and this timely appeal followed.[8]

II. DISCUSSION

A. *Applicable Law*

Under the "American rule" each party pays its own legal fees. This rule prevails absent explicit statutory authority. (*Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources* (2001) 532 U.S. 598, 602.) One statutory exception to the rule is found in section 1988 of the federal Civil Rights Act: "In any action or proceeding to enforce a provision of [section 1983] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (42 U.S.C. § 1988(b).) Claims for attorney fees under section 1988 "are available in any § 1983 action." (*Maine v. Thiboutot* (1980) 448 U.S. 1, 9–10 (*Maine*), italics omitted.) This includes section 1983 actions that are filed in state court. (*Maine*, at p. 10.) Section 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding . . . ." (42 U.S.C. § 1983.)

To be eligible for section 1988 fees, a plaintiff need not prevail specifically on a section 1983 claim. (*Filipino Accountants' Assn. v. State Bd. of Accountancy* (1984) 155 Cal.App.3d 1023, 1032 (*Filipino Accountants' Assn*.).) If the plaintiff prevails on a claim not covered by section 1988, and the validity of the section 1983 claim was never adjudicated by the court, the plaintiff is still considered to be a prevailing party under section 1988 provided that (1) the non-fee claim and section 1983 claim both arose out of

[8] Citing the $7,500 statutory limit for fee awards under Government Code section 800, Petropoulos has limited his arguments on appeal to the denial of his motion under section 1988.

a " 'common nucleus of operative fact' "; and (2) the section 1983 claim is "substantial," meaning that it is not inescapably foreclosed by prior decisions. (*Filipino Accountants' Assn.*, at pp. 1032–1034 [42 U.S.C. § 1981 claim], relying on *Maher v. Gagne* (1980) 448 U.S. 122, 132–133, fn. 15;[9] *White v. Beal* (E.D.Pa. 1978) 447 F.Supp. 788, 793.) Allowing fees in such cases " 'furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues.' " (*Filipino Accountants' Assn.*, at p. 1033, quoting *Maher v. Gagne*, at pp. 132–133.) However, a plaintiff who prevails on a state law claim, but loses on a related section 1983 claim, is not considered a prevailing party for purposes of section 1988. (See *Mateyko v. Felix* (9th Cir. 1990) 924 F.2d 824, 828, and cases collected therein.)

Whether a plaintiff has raised a section 1983 claim is to be determined from the allegations in the pleadings, regardless of how they are labeled. (*Best v. California Apprenticeship Council* (1987) 193 Cal.App.3d 1448, 1464.) The plaintiff's pleading need not cite section 1983 in order for section 1988 to apply, but must allege facts showing conduct committed under color of state law that deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. (*Best v. California Apprenticeship Council*, at p. 1463; accord, *Green v. Obledo* (1984) 161 Cal.App.3d 678, 682 (*Green*).)

---

[9] As stated in footnote 15 of *Maher v. Gagne, supra*, 448 U.S. at pages 132–133, Congress evidently intended the courts to apply the same "common nucleus" and "substantiality" tests in the application of section 1988 that federal courts had traditionally used to determine their jurisdiction over pendent state law claims and federal question claims. The "common nucleus" test is set forth in *Mine Workers v. Gibbs* (1966) 383 U.S. 715. (See also *Filipino Accountants' Assn.*, *supra*, 155 Cal.App.3d at p. 1033.) The test is satisfied in a proceeding under section 1988 if "the fee and non-fee claims [are] so interrelated that plaintiffs 'would ordinarily be expected to try them all in one judicial proceeding.' " (*Espino v. Besteiro* (5th Cir. 1983) 708 F.2d 1002, 1010, quoting *Mine Workers v. Gibbs*, at p. 725.) The "substantiality" test stated above is derived from *Hagans v. Lavine* (1974) 415 U.S. 528. (*Maher v. Gagne*, at pp. 132–133, fn. 15; *Filipino Accountants' Assn.*, at p. 1034.)

"While section 1988 gives a trial court discretion in deciding whether to award attorney fees to a prevailing party, that discretion is narrowly limited." (*McMahon v. Lopez* (1988) 199 Cal.App.3d 829, 836.) "The controlling standard is that a prevailing party plaintiff 'should ordinarily recover attorney's fees unless special circumstances would render such an award unjust.' " (*Ibid*.)

We review the trial court's denial of the motion for attorney fees under an abuse of discretion standard. (*Board of Administration v. Wilson* (1997) 57 Cal.App.4th 967, 973 (*Wilson*).) "The question is whether the trial court's actions are consistent with the substantive law and, if so, whether the application of law to the facts of the case is within the range of discretion conferred upon the trial court." (*Ibid*.)

B. *Analysis*

1. *Timing of Petropoulos's Claims*

In denying Petropoulos's fee motion, the trial court pointed out a factor that distinguishes this case from every other case Petropoulos has cited in support of his motion: Petropoulos is seeking fees under section 1988 based on constitutional claims that were raised by him for the first time on appeal. In our view, the trial court correctly held that section 1988 does not authorize fee awards based on section 1983 claims that (1) are unadjudicated and (2) were raised for the first time on appeal.

First, allowing fee awards based on claims first raised on appeal would widen the door to the assertion of meritless section 1983 claims "solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought." (*Maine*, *supra*, 448 U.S. at p. 24 (dis. opn. of Powell, J.).) The purpose of awarding section 1988 fees based on unadjudicated civil rights claims is to promote the filing of meritorious suits to vindicate constitutional rights, not to encourage the joinder of meritless claims intended solely for the purpose of obtaining fees. When a weak section 1983 claim is asserted in a trial court pleading, the defendant can protect itself from section 1988 fee liability by attacking the claim either at trial or by use of a pretrial motion such as a demurrer or motion for summary adjudication. A defendant who believes its chances of defeating the claim are better in federal court can seek removal to that forum. Such

opportunities to defend against civil rights claims are essential because the very liberal substantiality test adopted by *Maher v. Gagne* does little to weed out such claims when they are asserted primarily to seek fees. On the other hand, when a weak or frivolous civil rights claim is alleged for the first time on appeal, the defendant has no protection from exposure to fee liability unless the Court of Appeal chooses to address the claim. Put another way, the fact that a defendant has had a full and fair opportunity to seek an adjudication of a civil rights claim in the trial court provides an assurance that the claim has some merit, an assurance that does not exist if the claim is first raised on appeal and not addressed by the appellate court, as occurred here.

Second, allowing unadjudicated claims first raised on appeal to serve as a basis for section 1988 fee awards would require treating claims that are procedurally barred as if they met the substantiality test of *Maher v. Gagne*. Although appellate courts may have discretion in some cases to consider the merits of issues raised for the first time on appeal, the general rule is that such issues are deemed waived. (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167.) In this posture, the appellate court's silence on the issue does not support an inference that the claim might have been decided in the appellant's favor but for judicial reluctance to decide constitutional issues. (Cf. *American Auto. Mfrs. Ass'n v. Cahill* (N.D.N.Y. 1999) 53 F.Supp.2d 174, 181 & fn. 6 [appellate court's failure to reach civil rights issue on which defendants prevailed on procedural grounds in the trial court does not support an inference of merit sufficient to warrant award of fees].) The fact that this court chose to reach Petropoulos's statutory claim even though it had not been raised in the trial court has no tendency in reason to show that we would have ignored the waiver rule and decided the constitutional claims in his favor if the statutory ground had been unavailable.

Finally, allowing claims first asserted on appeal to serve as a basis for an attorney fee award inherently involves elements of prejudice and unfair surprise. In *Wilson*, the Court of Appeal affirmed the trial court's denial of fees under section 1988 on grounds of unfair surprise and prejudice where the section 1983 claim was not clearly disclosed by the pleadings and the prevailing party never mentioned possible recovery under

section 1983 until its postjudgment motion for attorney fees. (*Wilson, supra*, 57 Cal.App.4th at pp. 972, 974–976.) The court reasoned that although there was a substantial issue about the plaintiff's standing to seek relief under section 1983, the defendant did not have any reason to contest the plaintiff's standing until the fee motion was brought. (*Id.* at p. 975.) The appellate court found that it was within the trial court's discretion in these circumstances to deny the plaintiff's fee request on grounds of unfair surprise and prejudice. (*Id.* at p. 976.) In our view, the reasoning of *Wilson* applies with at least equal force here where the DRE had no reason to foresee any exposure to fees beyond the $7,500 limit until Petropoulos brought his fee motion on remand after appeal and, as discussed above, had no opportunity at any time to compel an adjudication of Petropoulos's section 1983 claims.

Petropoulos cites *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287 (*Drew*) for the proposition that nothing in section 1983 or section 1988 requires a federal civil rights claim used as a basis for a fee motion to be "set forth in the trial court, much less in a pleading." But *Drew* is distinguishable. It involved a fee request under Code of Civil Procedure section 1021.5, not section 1988. (*Drew*, at p. 1292.) The fee request was predicated on an argument raised in the trial court, not one raised for the first time in the Court of Appeal. (*Id.* at pp. 1293–1294.) That argument was not unadjudicated at the time the fee motion was heard; it had been decided by the trial court in favor of the party seeking fees and had determined the outcome of the litigation. (*Id.* at p. 1294.) Although first raised in a reply brief filed in support of the winning side's motion for summary judgment, both sides had thereafter been informed that the issue would have to be resolved and were given an opportunity to further brief it before it was decided. (*Id.* at pp. 1293–1294.) Based on those facts, the Court of Appeal rejected the trial court's finding that Drew was not entitled to fees because he had raised the prevailing legal theory too " 'belatedly.' " (*Id.* at pp. 1302–1304.) In light of its many distinguishing facts, *Drew* is not authority for the proposition that an unadjudicated civil rights claim raised for the first time on appeal can be the basis for a fee award under section 1988.

Green, *supra*, 161 Cal.App.3d 678 is also inapposite. In that case, the plaintiffs sought fees under section 1988 after the California Supreme Court had already upheld a judgment in their favor based on the defendants' violation of federal law, and after they had already been awarded fees under other theories, which the state was refusing to pay. (*Id.* at p. 681.) *Green* is distinguishable from our case in that (1) the plaintiffs in *Green* had from the outset of the litigation in the trial court pleaded facts showing " 'a classic section 1983 claim' ";[10] and (2) the claim had been adjudicated in plaintiffs' favor. *Green* also does not support Petropoulos's position here.

Finally, Petropoulos claims the dispositive legal basis for *Petropoulos I*—our conclusion that the relevant disciplinary statutes did not authorize the action DRE took against him—inherently states a violation of his right to substantive due process. To the extent that Petropoulos is thereby suggesting that a section 1983 claim was in fact adjudicated in his favor in *Petropoulos I*, we must disagree. *Petropoulos I* did no more than resolve a dispute between Petropoulos and the DRE about the proper interpretation of the relevant statutes under state law. It involved no finding, expressly or by implication, that the DRE's interpretation reflected an egregious abuse of power, flouting of the law, or special animus against the petitioner. Absent conduct of that extreme nature by an administrative agency, there is no substantive due process violation. (*Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1032, 1034.) Assuming arguendo that certain of Petropoulos's arguments in the prior appeal can be construed as claims under section 1983, none of those arguments or claims were adjudicated in *Petropoulos I*.

For these reasons, we agree with the trial court that Petropoulos is not entitled to fees under section 1988 based on section 1983 claims he raised for the first time on appeal that were never adjudicated in his favor.

---

[10] The quoted words are found in *Wilson*, *supra*, 57 Cal.App.4th at pages 975–976 in which a different panel of the Third Appellate District describes and distinguishes *Green*.

2. *Substantiality of Petropoulos's Section 1983 Claims*

We would also affirm the denial of fees on the alternative ground that Petropoulos's section 1983 claims were insubstantial under *Maher v. Gagne*. At the time these claims were raised, this court would have been constrained to reject them under the doctrine of sovereign immunity.

Section 1983 applies to "[e]very *person* who, under color of [state law]" deprives any citizen of the United States of rights secured by the Constitution or laws of the United States. (42 U.S.C. § 1983, italics added.) But states and their agencies are not "persons" subject to suit under section 1983. (*Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 71 ["neither a State nor its officials acting in their official capacities are 'persons' under § 1983"]; *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 829 ["*states and state officers* sued in their official capacity are not considered persons under section 1983 and are immune from liability under the statute by virtue of the Eleventh Amendment and the doctrine of sovereign immunity"]; *Comenout v. State of Wash.* (1983) 722 F.2d 574, 578, fn. 4 [Eleventh Amendment requires dismissal of section 1983 action against state and state agencies].)

It is true, as Petropoulos points out, that state officials may be sued in their official capacities for prospective relief. (See *Kentucky v. Graham* (1985) 473 U.S. 159, 167, fn. 14 (*Graham*).) Petropoulos argues that the relief he was seeking *was* prospective—the restoration of his broker's license. But *Graham* also makes it clear that the Eleventh Amendment bars suit against a state even if the relief sought is prospective only: "Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, . . . a State cannot be sued directly in its own name *regardless of the relief sought*." (*Graham*, at p. 167, fn. 14, italics added; see also *Wolfe v. Strankman* (9th Cir. 2004) 392 F.3d 358, 364 [state and its agencies not proper parties to suit seeking injunctive relief under section 1983].)

In this case, the only respondent named in Petropoulos's mandate petition was the DRE, an agency of the state. Although the petition's caption also listed "DOES 1 through 10," the body of the petition contained no allegations against any Doe respondent

and the petition was never amended to identify any Doe. The identity of the Commissioner who rejected the ALJ's decision and later revoked Petropoulos's license was known to Petropoulos, since both orders carried his signature. Petropoulos and the DRE were the only parties to the prior appeal before this court. Under these circumstances, any section 1983 claims Petropoulos raised in that appeal would have been subject to mandatory rejection under controlling Eleventh Amendment precedents because the DRE was not a "person" subject to suit under section 1983. For purposes of section 1988, Petropoulos's purported federal claims were too insubstantial to support an award of fees.

Petropoulos attempts to avoid this problem by arguing that he requested leave to amend the petition to name the DRE commissioner as one of the "Does" *after* the appeal was concluded and *after* the DRE filed its opposition to his motion for attorney fees raising the Eleventh Amendment issue. That belated request is irrelevant because the trial court lacked the power to grant it. The merits of the petition had already been decided on appeal and the matter was back before the trial court solely for issuance of a peremptory writ of mandate and a determination of Petropoulos's entitlement to fees. At that stage of the litigation, Petropoulos was not entitled to amend his pleadings solely in order to conform them to the legal theory propounded in his motion for fees.

Petropoulos's fee motion under section 1988 was properly denied. The unadjudicated section 1983 claims upon which he bases his claim for fees were insubstantial under controlling law and were asserted too late in the litigation to support an award of fees.

III. DISPOSITION

The order denying fees is affirmed.

_____
Margulies, J.

We concur:

_____
Marchiano, P.J.

_____
Graham, J.*

* Retired judge of the Superior Court of Marin County assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.